



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

Reference: Trade Practices Amendment (National Access Regime) Bill 2005

THURSDAY, 11 AUGUST 2005

CANBERRA

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SENATE
ECONOMICS LEGISLATION COMMITTEE

Thursday, 11 August 2005

Members: Senator Brandis (*Chair*) Senator Stephens (*Deputy Chair*), Senators Chapman, Murray, Watson and Webber

Participating members: Senators Abetz, Adams, Bartlett, Boswell, Brown, George Campbell, Carr, Colbeck, Conroy, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fifield, Forshaw, Hogg, Kirk, Lightfoot, Ludwig, Lundy, Marshall, Mason, McGauran, Murray, O'Brien, Payne, Robert Ray, Sherry, Stott Despoja and Wong

Senators in attendance: Senator Brandis (*Chair*) Senator Stephens (*Deputy Chair*), Senators Chapman, Murray, Watson and Webber

Terms of reference for the inquiry:

Trade Practices Amendment (National Access Regime) Bill 2005.

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[6.05 pm]

BERRY, Mr Luke Drummond, Member, Regulatory Affairs Committee, Australian Pipeline Industry Association

CARTWRIGHT, Ms Cheryl, Chief Executive, Australian Pipeline Industry Association

CHAIR—Welcome. The committee has before it your submission No. 1. Would you care to make a brief opening statement?

Ms Cartwright—Thank you for the opportunity to present our concerns regarding this legislation. APIA's main concern—as is ENA's—is the pricing principles not being included in the legislation. This might have been covered by previous speakers—we have not been here for the whole process. The private sector needs certainty when operating within a regulatory regime and pricing principles are an important part of that certainty. The Productivity Commission report *Review of the National Access Regime* found that there is a need for the regime but also found that the regime has a tendency to deter investment. The improvements which the Productivity Commission recommended covered two main areas: the need to improve procedures and the need to create more certainty for industry. The clear, unambiguous and fair pricing principles were one of the recommendations to improve certainty, transparency and accountability.

In its response to the Productivity Commission report, the government supported this recommendation. In fact, it was a key element of the government's response. Omission of the pricing principles raises concerns about whether the principles already agreed by the government will at be introduced. There is no time frame indicated for the principles and there is no indication that the principles to be eventually introduced will be the ones that the government has already agreed to. There is also no indication that industry would be consulted should those principles differ from what the government has already agreed to.

CHAIR—Agreed to with whom?

Ms Cartwright—The government's response to the Productivity Commission report on the national access regime agreed to the pricing principles.

CHAIR—I see. When you say 'agreed to', what you really mean is announced?

Senator WATSON—That is the alternative.

CHAIR—I am sorry: when you said 'agreed to', I was a little surprised. 'The principles the government has announced,' may be what you mean.

Ms Cartwright—Okay, I mean the principles the government has—

CHAIR—It is not as though there has been an agreement with industry participants.

Ms Cartwright—No.

CHAIR—The government has announced—

Ms Cartwright—No, sorry. The Productivity Commission report had a response from the government and in the government's response it had agreed pricing principles.

Mr Berry—Yes. They were very similar to the ones recommended by the Productivity Commission.

Ms Cartwright—They had minor amendments. I am not suggesting that it was a deal done with industry; it is government's pricing principles.

CHAIR—Thank you.

Ms Cartwright—It is not clear why all the government's agreed amendments are included in this bill except the pricing principles. It can send the wrong message to industry, a message that certainty for industry is not a priority, and it could send a message that the government is prepared to ignore previous commitments. The Trade Practices Act sets a framework for industry-specific regimes. So something as important as pricing principles should be part of the legislation. It is part of the process to help industry make long-term investment plans and leaving out pricing principles would mean that the government would be missing an opportunity to actually improve the current regulatory environment for industry. Industry needs certainty in order to make long-term investment decisions. The Prime Minister's infrastructure task force also called for more certainty in regulatory regimes and, importantly, the Productivity Commission report *Review of the Gas Access Regime*, given the previous papers on this issue, actually assumes the certainty of pricing principles.

The Australian Pipeline Industry Association urges senators to amend the legislation to include pricing principles and to take an important step towards improving the regulatory environment for industry. An improved regulatory environment will encourage efficient investment by the private sector. From the pipeline industry's perspective, while transmission pipelines are generally unseen, they are essential infrastructure. Increasing investment in this infrastructure, as in other infrastructure, is surely good for the nation. My colleague, Mr Berry, and I would be happy to take questions.

CHAIR—Thank you very much, Ms Cartwright. The previous witness Mr Crawford mentioned that his association had had discussions with Treasury in relation to the pricing principles. Has yours?

Ms Cartwright—No, I have not and I do not think the committee has.

Mr Berry—No, we have not directly had those discussions.

Senator STEPHENS—Thank you for your submission. You raise some other interesting issues and confirm the concerns of previous witnesses. That is an important message for us as well. The issue of the pricing principles is the first one. We had discussion earlier—perhaps you did not hear the witnesses talking about regulatory risk and their concern that that was not part of the principles, as well as the concern about the principles not being in the legislation. Do you think that it would improve the legislation to include the principles in the legislation?

Ms Cartwright—Absolutely. We need the pricing principles in the legislation to provide guidance to the other access regimes, in our case the gas access regime.

Mr Berry—The legislation forms a bedrock, the yardstick for the development of industry-specific regimes and there is an interaction through the certification process. As a result, it provides guidance for the development of the other regimes.

CHAIR—The Productivity Commission report to which this is responsive points out that, for example, in the electricity code and in the gas code detailed pricing principles are set out. Perhaps—and I am anticipating here—it may be said that pricing principles are best dealt with by industry codes rather than by statutes. What do you say to that?

Ms Cartwright—The codes need the guidance of the main legislation.

CHAIR—But there is an objects clause inserted. I suppose you could say that by putting in an objects clause, that is the guidance and then the code based pricing principles are the specific application of that in a flexible way to particular industries.

Mr Berry—Yes. I do not think there is necessarily any conflict between having some specific principles in the industry codes and that governments and regulators in their wisdom can consider those matters. But the national access regime really forms the catch-all for the situations where the industry codes do not apply. As a result, it also provides a basic intellectual platform for the development of the codes and for informing what sorts of principles should be in there. Also, when there are reviews such as the Productivity Commission review, they will look to those principles in the legislation in order to consider whether or not those electricity and gas code principles are appropriate. There is certainly a review of transmission pricing under the electricity code due to commence shortly. They will have reference to the sorts of objectives that governments and parliaments are enacting through this sort of legislation.

CHAIR—And what do you say to the suggestion I put to a previous witness? That perhaps one way of compromising, as it were, would be to have a two-tier pricing principle so that core principles of generic application could be legislated for and more industry-specific principles, which arguably need to be more flexible, could be left outside the act, either by being included in regulations or, as is currently the case, in industry codes. What do you say about that?

Ms Cartwright—The government's pricing principles that have been excluded from this legislation are a general guidance for the other regimes. That is why it is inherently important that they actually go in this legislation—for exactly the reason you are saying.

CHAIR—I understand. Thank you very much. Do other senators want to pursue pricing principles question now?

Senator MURRAY—I have only one question, Chair. The question of whether there should be pricing principles is broadly supported. So then there is the question of where they should reside. The chair has an interesting proposition that he has been putting.

CHAIR—I think my proposition has been persuasively blown out of the water by Ms Cartwright, Senator Murray.

Senator MURRAY—Nevertheless, it has been an interesting proposition that you have been putting. The only other question is the question you have raised—that is, the time frame by which pricing principles should be established. My view is that you have to get on with this. This is not a nice-to-do bill; this is nasty bill because infrastructure is an issue of concern.

CHAIR—Particularly, if I might say Senator Murray, since it is responsive to a September 2001 report!

Senator MURRAY—Yes. You have said that there is no time frame in which the minister must determine pricing principles and to my mind one of the good contributions this committee could make is to recommend that a time frame be established in the bill. I do not like open-ended bills; I do not like open-ended process because things can drag out. Is that a practical, reasonable proposition? Are the issues so complex that the minister needs an open-ended discretion or should the commission be saying, ‘Within six months of assent’ or whatever ‘we want the pricing principles determined and published’?

Ms Cartwright—If the Senate was not going to change the bill and include the pricing principles, there would definitely need to be some assurances that the principles that were to be introduced reflected what the government had already agreed to; that if they were going to change, industry would be consulted. It would be difficult to explain why the government would need to change its mind about them because they have obviously thought about it.

Senator MURRAY—Except the legislation requires the minister to determine. That is a precise process, as you would know from your background. The Senate might or might not decide to go in a particular direction but there is still the question by which period or by which time the pricing principles should be established. My question to you is: do you have a time frame in mind which would be a reasonable time to give the minister to make a publication? I do not know what else might be in the minister’s or the department’s mind which could delay publication.

Ms Cartwright—My colleague might speak about the timing but initially I would like to say that, if the Senate does not alter the legislation, we would ask the Senate to stipulate a time frame and to stipulate that the pricing principles reflect the government’s already published view, already agreed pricing principles, and also stipulate that if they are changed, industry be consulted. Mr Berry might have a comment on the time frame.

Mr Berry—In some senses, we would like a shorter time frame rather than a longer one, given that this process really kicked off with a review in 2000. In a sense, where you have a subordinate instrument and a ministerial decision, it is always a process that can be reopened and the initial time frame might be short but there is always a danger of a reopening and a re-examination of the principles down the track. In a sense, there would never be closure on this issue, to the extent that—

Senator MURRAY—We well understand that, if there is ministerial discretion, they can revise the position they have taken, but the question is that a position has to be taken. The point being made earlier was that the government has announced the position it will take. But that is not yet a question of law, of administrative determination or of statutory determination.

The point you have made is that there is no legislative provision by which that should happen. I cannot conceive of a process which allows for it not to happen, if you understand what I am driving at. So what I want is a straight answer. Does it matter if the committee were to say: we recommend that within six months of assent—at least by then; it could be shorter—the pricing principles be published and determined?

Ms Cartwright—If the legislation is not changed, the shortest time frame possible; yes, it perhaps should be recommended, but we would still be concerned that it would be done by regulation, and industry would not have the same sort of opportunity to comment on what those principles would be.

Mr Berry—It would also stand in contrast to the long gestation for the development of the current pricing principles, which has been a process of consultation and response over a four- or five-year period, so that it is distilled into the principles that we have got here.

Senator WEBBER—I want to touch on two quick areas. I am sorry for this, I guess it is getting a little repetitive, and I do not want to make you repeat yourselves all the time. The chair reminded us that this is in response to a report that came out in September 2001. So we have obviously seen a fair bit of delay in terms of the government’s response and now this piece of legislation which has obviously had some change along the

way with the removing of the principles. Do you think that delay in response has created any uncertainty in terms of investment?

Ms Cartwright—I think it would be too hard to tell.

Mr Berry—I think that industry is looking for some moderate changes to part IIIA which would improve investor certainty. Certainly when you look at the objectives of the bill, the four objectives that have been identified all relate to improving certainty for all parties involved in the process. The pricing principles are a key element—

Senator WEBBER—To giving that certainty.

Mr Berry—To the extent that there has been a delay and that these are principles that we desire now and would have desired in the past—

Senator WEBBER—So it could well have had an impact on investment.

Mr Berry—It could have. It is just difficult to isolate that factor from every other factor in the investment climate.

CHAIR—Mr Berry, just looking at the pricing principles in recommendation 12.1, they seem pretty anodyne.

Mr Berry—They are very high level, that is right. As for concerns about things like flexibility, they are relatively high level so that there is quite a lot of flexibility within them to develop further approaches.

Ms Cartwright—And that is to cover for the various access regimes that come under this legislation. If I could take Senator Webber's question a little further, with the gas transmission industry—you were asking about what we are concerned about with delays—our main concern is the Productivity Commission review of the gas access regime. That came out in June last year. We are now waiting for there government's response to that, and that seems to be fairly close.

Senator WEBBER—Could we have feedback on when we can expect that?

Ms Cartwright—The Ministerial Council on Energy said that they would provide a draft response in September. It is possible that I am focused on it because I have been working for the industry for only five months. I am pretty focused on the gas access regime report even more than this one, and that is a very important report to our industry.

Senator WEBBER—Is it a report that your industry agrees with?

Ms Cartwright—Yes—well, it is a compromise. While we do not agree with all the recommendations, we accept the report as a whole, rather than cherry picking, and we are asking that the government and the bureaucracy do the same.

Senator WEBBER—That probably leads me to my second question, and it is a separate issue. Does your association believe that there is a case for further regulatory reform—accepting your support for this piece of legislation and accepting that you say, as does almost everyone except ERA from my home state, that the pricing principle should be in there? I have not discussed this with my colleagues, but I think you have sold me on that argument. Is there need for further regulatory reform in your area?

Ms Cartwright—That is happening. The need for regulatory reform was recognised by the Prime Minister's infrastructure task force. Gas transmission pipelines even got a mention in that. So there is a recognition that we need regulatory reform in the sense that more light-handed and less intrusive regulation, more certainty and a better understanding of business are required. At the same time, business understands that where there is a natural monopoly we still need to have an access regime in place.

CHAIR—Thank you, Ms Cartwright and Mr Berry. You are excused.